

***United States Court of Appeals  
for the Second Circuit***



**PETITIONER'S  
BRIEF**



**Nos. 76-4087, ~~71-2308~~**

**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,  
*Petitioner,*

v.

THE GREASE COMPANY and THEATRE NOW, INC.,  
*Respondents.*

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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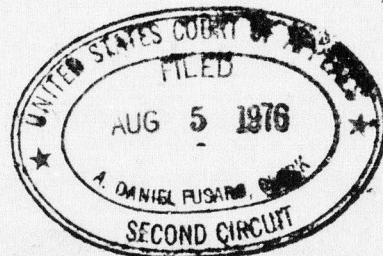
National Labor Relations Board.  
Washington, D.C. 20570

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**BRIEF FOR  
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**STATEMENT OF THE ISSUES PRESENTED**

1. Whether substantial evidence on the record as a whole supports the Board's finding that Joseph F. Doucette, Sr., was an employee within the meaning of Section 2(3) of the Act.
2. Whether substantial evidence on the record as a whole supports the Board's finding that Respondents violated Section 8(a)(3) and (1) of the Act by discharging employees Joseph F. Doucette, Sr. and Joseph F. Doucette, Jr. because of Doucette, Sr.'s participation in union activities.
3. Whether substantial evidence on the record as a whole supports the Board's finding that respondents violated Section 8(a)(1) by stating

reasons for discharge violative of the Act which could be expected to be relayed to employees.

### STATEMENT OF THE CASE

This case is before the Court upon application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Section 151, *et seq.*), for enforcement of its order issued against Theatre Now, Inc. (herein "Theatre Now") and The Grease Company (herein "Grease Company") (collectively called "respondents") on June 13, 1974.

The Board's decision and order (A. 277-286)<sup>1</sup> is reported at 211 NLRB 525. The Board's Supplemental decision and order on remand (A. 288-290), issued December 10, 1975, reaffirming the Board's original order, is reported at 221 NLRB No. 182. This Court has jurisdiction of the proceedings inasmuch as Theatre Now and Grease Company both transact business and have offices in New York City.

### I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that Theatre Now and Grease Company as joint employers violated Section 8(a)(3) and (1) of the Act by discharging employee Joseph F. Doucette, Sr. (herein "Doucette" or "Doucette Sr.")<sup>2</sup> because he participated in the processing of a grievance by the Union<sup>3</sup>

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<sup>1</sup>"A" references are to the printed appendix. Those preceding a semi-colon are to the Board's findings; those following are to the supporting evidence.

<sup>2</sup>Only Doucette Sr. is referred to herein as simply "Doucette".

<sup>3</sup>International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 381.

on behalf of employee Robert Weeden. In so finding, the Board concluded, contrary to the Administrative Law Judge, that Doucette Sr. was an employee within the meaning of Section 2(3) of the Act rather than a supervisor within the meaning of Section 2(11).<sup>4</sup> The Board also found that the discharge of Joseph F. Doucette, Jr. (herein "Doucette Jr.") was so closely linked with his father's unlawful discharge for participation in a protected activity that his discharge also violated Section 8(a)(3) and (1) of the Act. Finally, the Board found that respondents violated Section 8(a)(1) of the Act by stating to Doucette Sr. reasons for the discharges which were violative of the Act under circumstances in which such statements would likely be relayed to employees.

#### A. Formation of the road show.

*Grease*, a Broadway musical comedy satirizing the rock music craze of the 1950's, opened in New York City in December 1972. At the same time, a road production went into rehearsal. Theatre Now was hired by Kenneth Weissman and Maxine Fox, husband and wife and the producers of *Grease*,<sup>5</sup> to manage both the Broadway and the road productions (A. 5; 158-159). Edward H. Davis, a vice president and stockholder in Theatre Now, was named general manager of both productions and immediately began hiring for the road show. Doucette Sr., a stagehand for 20 years and a qualified master carpenter, heard about the road show and applied to Davis for the job of master carpenter (A. 5; 63, 161).

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<sup>4</sup>In view of this finding, Board Members Jenkins and Penello deemed it unnecessary to consider the Administrative Law Judge's conclusion that the discharge of Doucette Sr., if a supervisor, violated Section 8(a)(1) of the Act. Member Fanning indicated that he would, alternatively, affirm the Administrative Law Judge's Section 8(a)(1) rationale (A. 279, n. 2).

<sup>5</sup>The two producers will be referred to as "the Weissmans", and Mrs. Weissman will be referred to as "Miss Fox" (see A. 5, n. 1).

Doucette thereafter obtained the plans of the scenery and studied them. When he again met with Davis December 13, Davis said his goal was to see the show "hung" (the scenery set in place) in eight hours rather than in the two or more days then required. Doucette agreed to try to do so, stating that he "would need about three or four times to see what [he] could do" (A. 5-6; 78-79).

At this same meeting, General Manager Davis asked Doucette if he could get an assistant or if he preferred that Davis hire one. Doucette said that he wanted his son, but that the salaries Davis offered were insufficient (A. 6; 131-132). Doucette explained that his son had helped him on *Purlie*, another Broadway show, and that he would prefer him because he would have to "work with" whoever was hired (A. 6; 132, 158). Doucette Sr. eventually agreed that he and his son would work as carpenter and flyman,<sup>6</sup> respectively, at the salaries offered, subject to a promise that in six weeks they would received "automatic" increases if the show were hung in eight hours. On this basis, Davis signed contracts with both Doucettes (A. 7-8; 64, 78, 132, 150, 248-258).

#### B. The work of Doucette Sr.

Doucette Sr. was hired "to strawboss" the carpenter operation of the *Grease* road show (A. 191). After the show's opening in Boston in December 1972, Doucette and Donald Antonelli, company manager of the road show, decided on the number of carpenters and other stagehands they thought were needed for the show through its tour (A. 10; 91, 98-99, 136-141). In addition to the two Doucettes, who traveled with the show,

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<sup>6</sup>The flyman, on a catwalk above the stage, raises and lowers ("flies") scenery on-to the stage on cues from the stage manager (A. 11-12; 64-65).

the local union in each of the 14 cities on the tour supplied about 12 stagehands to set up and dismantle the show and 3 or 4 to operate it during the engagement (A. 154).

Doucette, as master carpenter, had the responsibility of fitting the scenery onto the stage of each theater, each of which differed physically (A. 279, 10-11; 88-92). To work this out, he would make a preliminary visit to the theater to be played next. With approval of Manager Antonelli, he would decide how many local carpenters would be needed (A. 10, 11, 278-279, 314; 65-66, 136-139, 155, 360, 368, 322-323). Doucette would then fill out a "yellow card" listing the number of men needed for each operation: setting up the scenery, handling it during performances, and dismantling it. (A. 273, 275). After getting the card signed by the local representative of the stagehands' union where the show was playing, he would send one copy to the national office of the Union in New York and one to the Union representative in the next city to be played, who would then select and send the required men to the theater (A. 135-139, 99, 100, 360). When the scenery arrived, Doucette working with his son and the local carpenters would unload and set up the scenery (A. 11, 279; 88-90, 324, 346).

Each theater had a "house carpenter" who was familiar with local Union rules and the skills of the area carpenters (A. 313; 345-346). Doucette would decide generally what work was required and its order, and the house carpenter would select employees from the local crew to perform particular tasks (A. 313; 345-346, 323-324). Doucette would show carpenters how and where to hang the scenery, but any "problem" with a local employee was handled by the house carpenter (A. 313; 346). Doucette Jr., as flyman, acted as his father's assistant and was responsible for keeping the scenery in working order and for bringing it on and off the stage on cues from the stage manager (A. 11; 64-65, 152-153, 156-157,

326-327, 348-349). The Doucettes were found to be rank-and-file employees (A. 36, n. 34, 278-279, 313-315).

C. The show plays four cities:  
Doucette Jr. receives a \$25 raise.

After the Boston engagement, the show played Philadelphia and New Haven and then moved to Baltimore for an engagement January 29 through February 10, 1973.<sup>7</sup> The Waissmans saw the show in Boston and Philadelphia, but not in New Haven (A. 12-13; 196-197). Producer Kenneth Waissman's only comment after these viewings was a direction to stage manager William Leddich at Philadelphia that the "sight lines" in the Baltimore theater should be watched closely in order to keep as much of the production in full view of the audience as possible (A. 13; 216). On opening night in Baltimore, the Waissmans inspected the sight lines after the set was hung and, while they expressed approval, they were concerned that some action could not be seen from certain seats. They asked Doucette whether he could alter the black "masking" curtains on the sides of stage to reduce obstruction of the view; he did so and was thanked by them (A. 13; 83, 198). The opening night in Baltimore was a huge success; the Waissmans were especially pleased since Baltimore was their home town. They concluded that the set was "generally fine", expressed themselves as "elated" and congratulated the entire company, including Doucette. (A. 13; 84, 198-199). Later that week Doucette Jr. received a \$25 increase in pay (A. 13; 151). Doucette Sr. was still trying to reduce the scenery "hanging" time to eight hours, and, to this end, he asked and received Davis' approval to cut two feet off the back of the set (A. 13-14; 84).

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<sup>7</sup> All dates hereafter are 1973, unless otherwise indicated.

**D. Doucette Sr. succeeds in hanging the show in eight hours; he receives praise and a \$50 raise and his son receives a bonus**

After playing Baltimore, Pittsburgh, Columbus, and Indianapolis, the show opened in Washington, D.C., on March 5. There, Doucette for the first time succeeded in hanging the show in eight hours. General Manager Davis told him that he was "very happy . . . I knew you could do it in the time we wanted, in one day. It was a great saving for the company" (A. 14; 75). Doucette Jr. received a \$25 bonus on this occasion with the promise of a similar bonus each time the show was hung in eight hours — as occurred during the remainder of the Doucettes' employment (A. 14; 151-152). Near the end of March, while the show was at Cleveland, Doucette Sr. called Davis and reminded him of his promise of a \$50 raise if he could hang the show in one day. Davis at once agreed to the raise, which Doucette received in that week's paycheck (A. 14; 76-77).

**E. Deficiencies of the show at the end of the Toronto run in April**

Stage Manager Marino, who had joined the show during the March engagement in Washington, first took over as sole stage manager during the Toronto engagement April 2-21 (A. 299; 319, 172).

On April 18, the Wednesday before the show was to move to Detroit over the weekend, Producer Fox accompanied by Production Supervisor Thomas Smith and Choreographer Patricia Birch came to Toronto and watched the matinee. Smith found the show "tired-looking," "a little bit sluggish," and the performances "a little slow" (A. 15-16; 230-231). Specific complaints included: Music variously too slow or too fast for the choreography; accessories missing from costumes (defects which were the responsibility of the wardrobe man and stage manager); wrong hair-dos (responsibility of the

hairdresser and stage manager); props torn and poorly repaired or refurbished (responsibility of the prop man and stage manager) (A. 16, 320; 231-233, 239-240, 329-330).

According to Marino, he met with Smith and Fox and they blamed Doucette Sr. for several deficiencies in the scenery. One of these was the absence of the "Edsel" panel, a piece of scenery showing an Edsel car parked in front of a liquor store, which was supposed to be on the stage only about one minute between numbers (A. 298-299; 326-327, 343). Marion reported that Doucette Sr. had recommended not using the panel in the Toronto theater and, after trying it, Marino had agreed, concluding that "it would be dangerous to use" because it was badly warped and would "catch a lot on a large pipe" and "could knock off a light" (A. 300, 326-327, 343-344).

Another defect attributed to Doucette was "a crack . . . in the park flat" (A. 330). This "flat" was a large photo on two wood panels which had to be bolted together at each setup for stage display (A. 241, 330). According to Smith, the crack or "seam" between the two panels "was bigger than it was in Boston" when the show was new, and it looked worse "after getting put together and taken apart a number of times between the Boston opening and the Toronto run" (A. 231-232). Marino explained that this was an item Doucette "couldn't repair on the road" because he would have had "to get a new photograph and blow it up, which we were not able to do" (A. 330). Replacement required approval of General Manager Davis (A. 241). Smith agreed that it could not be repaired and a new one should be made, concluding that "it wasn't worth discussing" (A. 237).

To a complaint about the look of the palm trees used in one number, Marino responded that it was because the road show trees were flat while

those in the New York production were three-dimensional (A. 330). Another complaint was that some masking curtains on the sides of the stage were not hung (A. 330). Marino responded that "there was no time to hang the masking," which was the last thing done in setting the stage (A. 330-331). Marino regarded the masking as unimportant because only "four or five seats on the side of the house could see up through there" and thought the show looked fine without the masking (A. 310; 330-331, 349-350). Smith was concerned about "[j]ust those two things [the Edsel panel and the masking] as far as the carpentry was concerned" (A. 235) and replied that "we have got to have it taken care of regardless" (A. 331). Doucette was under orders to "hang" the show in one day and Smith later acknowledged to him "the time problem" (A. 301; 237). Marino, however, told Smith and Fox that he was having some difficulty getting along with Doucette, indicating that it "wasn't so much problems that I had. It was feelings . . . and the attitude I had about what he was like" (A. 303; 334).

The next day, April 19, Doucette returned from Detroit where he had been doing advance work for the opening there on April 23. Company Manager Antonelli told him that Miss Fox had said that the sets were dirty and should be refurbished; he told Doucette to call General Manager Davis to get an "O.K." for painting (A. 19, 311-312; 125, 362-363). When Miss Fox told Doucette that the paint was peeling and should have been renewed and that some seats on stage should have been reupholstered, he explained, "we were going to do it but we didn't have the money to do it in Detroit for the opening in L.A." (A. 19, 312; 125, 363, 370-371). Either Fox or Davis then authorized that the painting be done (A. 19-20; 205, 208, 370-371).

Also on April 19, Production Supervisor Smith asked Doucette about the absence of masking; Doucette replied that "there was a problem in

hanging it [the masking] the way it had been hung in Boston" (A. 20; 236). Smith also asked Doucette to find another way of hanging the palm trees but did not mention the "crack" in the panel (A. 20; 237). The cited deficiencies were corrected by the time the show opened in Detroit (A. 20; 125).

**F. The Waissmans' vague response to Marino's request for discharge of Doucette Sr. at Detroit May 17.**

On May 17, the fourth week of the Detroit run, the Waissmans with Jack Shearing, designer of the sound for the original New York production, came to Detroit at Marino's request because Marino "was having difficulty with the sound manager," Robert Weeden. (A. 304-306; 334-335). Weeden was given notice of discharge about a week later. After discussing the sound problems, Marino said he was also dissatisfied with Doucette Sr. and asked that Doucette be replaced "right away" (A. 304; 333-336, 352-353). Marino viewed Doucette as lazy and irresponsible and his complaint was "not a specific" but "kind of a general thing, and [he] was not referring back, necessarily to Toronto" (A. 304; 356, 333). Waissman stated that he would "look into it," attempted to "pacify" Marino, but did not state that Doucette would be discharged (A. 304; 335-336, 353). However, it was Marino's belief from this conversation that Doucette eventually would be discharged (A. 304; 353), but no management representative ever reprimanded or warned Doucette Sr. or told him of the alleged dissatisfaction with his work prior to his involvement in the Weeden grievance May 29-June 1 (A. 21, 298, n. 5; 74, 123, 128, 188, 355).<sup>8</sup>

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<sup>8</sup> However, on various occasions, Marino had made unfavorable comments about the work of Doucette Jr. to Doucette Sr., Waissman, and Davis (A. 307-308; 337-339, 352-353). Smith also passed "notes" to Marino for Doucette Jr. concerning "some of the patterns that were too slow" in making scenery changes at Toronto and later in Detroit (A. 20; 244-245, 234).

**G. Doucette Sr. participates in the Weeden grievance sessions;  
General Manager Davis tells him to desist, but he  
continues to participate**

When Soundman Bob Weeden received notice of discharge in Detroit on May 25, he telephoned from that city to complain to Doucette Sr. who was in Cincinnati doing "advance" work (A. 21; 114, 144, 180). Doucette advised him to talk to the local Union business agent; Weeden did so and was advised by the Detroit business agent to call Edward Vignale, the Union's business agent in Cincinnati when Weeden reached there (A. 12; 116-117). To expedite matters, after setting up the show in Cincinnati on May 29, Doucette called Vignale and asked him to come to the theater to speak with Weeden (A. 22; 118). At Vignale's suggestion, Doucette arranged a conference with Company Manager Antonelli and Stage Manager Marino for Vignale (A. 22; 118-119). In doing so, Doucette told Marino that Weeden wanted to know why he had been fired (A. 22; 119-120). Upon Vignale's arrival at the theater on May 29, Doucette introduced him to Marino, and Vignale asked Doucette to "sit in" on the grievance meeting (A. 22; 66-67, 119-120, 147, 142-143). When Marino questioned Doucette's presence, Vignale replied that he was there to sit and listen just as Antonelli was (A. 22, 315, n. 22; 69, 340).<sup>9</sup> Marino then explained that Weeden had been fired because the sound was not up to "par" in Detroit and that "I don't want him anymore. I just want him to go, and that's it." (A. 22; 67-68, 142-143, 340). Doucette asked Marino to be more specific, but Marino refused (A. 22; 68). The meeting ended inconclusively (A. 22-23; 68, 142).

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<sup>9</sup>Marino was not surprised at Doucette's presence at the meeting because "it was his responsibility. He was the shop steward . . . [and] he was there to protect . . . Mr. Weeden to see that he was properly heard" (A. 314-315; 340). Manager Antonelli was also not surprised at Doucette's sitting in at the meeting because "... he was 'Poppa Joe'. He was a friend of the family . . . besides being the head carpenter . . . I thought that it was second nature for him to be there" (A. 316; 365).

The same day, May 29, Company Manager Antonelli phoned General Manager Davis and reported on the meeting with Union agent Vignale to discuss Weeden's discharge (A. 23; 315-316; 180, 373). Later that day or the next morning, Davis telephoned Doucette Sr. and asked why he had been "getting involved in this" (A. 23; 180, 191). Doucette replied that he had only advised Weeden of his rights. Davis answered ". . . okay, you advised the man of his rights. Now let's let them take care of it" (A. 23; 180).

Doucette, however, was again present when Vignale, Antonelli and Marino held a second meeting on May 30 (A. 23; 69, 143). Vignale stated that the Union could not get Weeden's job back, but that he was entitled to be paid through the next engagement, at Denver, which was to end June 10 and in addition to receive a week's vacation pay (A. 23; 144). Marino responded, ". . . we don't need [Weeden] for Denver; he's done here as of Saturday night" (*ibid.*). Vignale answered that as long as Weeden received his pay and vacation that was "fine" with him (A. 23; 69-70, 144). Doucette "just listened" during this meeting (A. 23; 121). When Weeden later told Vignale that Antonelli had said Weeden must work through the Denver engagement, Vignale called another meeting for June 1 and again asked Doucette to accompany him to the meeting (A. 24; 70-71, 121, 144-145). Doucette objected to attending and stated that he was getting too deeply involved and was afraid of his own discharge, adding that "[a]fter we go into L.A. they don't need me, they are going to have a [long] run there" (A. 24; 122, 147-148). Vignale remarked that Doucette must be "kidding" and insisted that he attend the meeting; Doucette complied (A. 24; 122, 148).

At the June 1 meeting, Union business agent Vignale asked why he had not been told that Weeden would have to work in Denver, and Marino replied that his "New York office" had so decreed since the last

meeting. Vignale then stated that he supposed that Weeden would have to work the Denver engagement as long as he was being paid for it. (A. 24; 145, 70.) Following this last Weeden grievance meeting, while the show was in Denver (June 5-10), General Manager Davis made a telephone call "to find out the availability" of a new carpenter (A. 24; 195).

**H. The Doucettes are abruptly discharged in Los Angeles on June 17; General Manager Davis tells Doucette Sr. he was discharged because of his grievance activity**

On June 12, the show had opened in Los Angeles for a 12 or 13 week run. The Waissmans were present and told Doucette Sr. (or a group of company members including Doucette) that the show looked "beautiful" or "wonderful" (A. 25; 75-76, 86-87).

On June 17, the first Sunday after the Los Angeles opening, General Manager Davis called Company Manager Antonelli and directed him to discharge the Doucettes (A. 308; 365-366). Antonelli summoned Doucette to his office, closed the door, and said "I got to let you and your son go" (A. 25, 308-309 and n. 14; 71, 368). Doucette replied, "You got to be kidding." Antonelli said "No. I got to do the dirty work." When Doucette asked for a reason, Antonelli said, "I don't know, I don't have a reason. I was told to pay you off, to terminate you and your son." Doucette then asked why his son was terminated, and Antonelli replied, "Because he is your son." (*Ibid.*). He gave Doucette Sr. the paychecks for both and said, "I'm sorry. There's nothing I can do with this. It's out of my hand, it's coming from Mr. Davis" (A. 25; 71, 182-183). When Doucette said he would like to check with Davis, Antonelli replied "I wish you would call Mr. Davis and he will tell you the reason" (A. 25, 309; 71, 368). Doucette conveyed the news to his son during the evening performance, remarking that he "really didn't quite believe it" (A. 25; 151).

Antonelli approached Doucette Jr. at the end of the show and said, "I'm sorry for what has happened. I am going to miss you and your father" (A. 25; 150).

The next day, June 18, Doucette Sr. telephoned General Manager Davis for an explanation of the discharges (A. 26, 28; 71-72, 128). Davis replied that he "was mad at [Doucette] for bringing the [Union] representative into Cincinnati" which was causing Davis "troubles" (A. 28; 72, 128). Davis also declared that Doucette "should have minded [his] own business and [he] should have never got into that part of it" (*ibid.*). Doucette then asked "Why is my son going? He had nothing to do with it. He never attended none of the meetings" (A. 28; 72, 129). Davis responded, "Because he is your son" (*Ibid.*). Davis added, "I was going to fire you three weeks prior, I was going to fire you in Cincinnati, but I needed you for the opening in LA, but now I don't need you" (A. 28-29; 72, 128-129).

On June 19, when the Doucettes returned to the theater to get their belongings, Stage Manager Marino asked Doucette Sr. why Doucette Jr. was so "mad" and "bitter" toward him (A. 26; 72-73). Doucette Sr. replied that Marino must have had something to do with the discharges. Marino answered, "I had nothing to do with it. I just heard about it Sunday afternoon. I was just as surprised as you were. We finally got where we could work together. I just don't believe it." (A. 26, 306-307; 73, 341.)<sup>10</sup>

No replacement for Doucette Sr. as traveling or "road" master carpenter was employed until about the second week of September when the show

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<sup>10</sup> According to Marino, he told Doucette something to effect "I'm sorry. I didn't know that this was going to happen," but he was not in fact surprised by the discharge (A. 307; 341).

was about to move from Los Angeles to its next engagement in Chicago (A. 315; 367). A local carpenter was employed to do the work of Doucette Sr. during the 12 or 13 week Los Angeles run, but he was not deemed competent to "move" the show (A. 367-368.)

## II. THE BOARD'S CONCLUSIONS AND ORDER IN ITS ORIGINAL DECISION

In its original Decision and Order, the Board found Doucette Sr. was a non-supervisory employee and that respondents violated Section 8(a)(3) and (1) of the Act by discharging him because of his participation in the Union grievance on behalf of employee Weeden and by linking the discharge of Doucette Jr. to that of his father (A. 278-280, 28-35, 45-46). The Board also found that respondents violated Section 8(a)(1) of the Act by stating reasons for the discharges which were violative of the Act, under circumstances where such reasons were likely relayed to employees (A. 277-278, 46-47). The Board's order directed Grease Company and Theater Now, as joint employers (A. 47-49), to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Affirmatively, the order requires Grease Company to offer both Doucettes reinstatement to their former positions, to make them whole for any earnings they lost as a result of their discharges, and along with Theater Now, to post appropriate notices (A. 281-286, 50-51).<sup>11</sup>

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<sup>11</sup> Since the understanding between Theatre Now and Grease Company gives the former no authority to reinstate either Doucette without Grease Company's permission, the Board directed Theatre Now only to request Grease Company in writing to offer the Doucettes reinstatement (A. 282, 51).

In finding that Doucette Sr. was discharged for his May 29-June 1 participation in the Weeden grievance, the Administrative Law Judge (A. 29-33), affirmed by the Board (A. 277-278, 279), rejected the testimony of four of respondents' witnesses that the decision to discharge Doucette Sr. was made by the Waissmans between April 18 and 23 and was based on the poor condition of the show in Toronto. The Administrative Law Judge found that Doucette Sr. was a generally reliable witness (A. 6 n. 3, 16 n. 10, 20, n. 16, 28-29), and credited his testimony that General Manager Davis made the discharge decision and based it on Doucette's participation in the Weeden grievance (A. 28-29). These credibility determinations were based in part on the respondents' failure to call Company Manager Antonelli and Stage Manager Marino (who were still employed by respondents at the time of the hearing (A. 247-248)) to testify as to certain matters pertaining to the discharge (A. 16-17, n. 10, and n. 11, 18 n. 13, 18-19, n. 14, 20, n. 16, 25 n. 20, 26 n. 21, 33).<sup>12</sup> In addition to exceptions, respondents filed a motion with the Board (dated December 18, 1973) to re-open the record to receive the testimony of Marino, Antonelli, Tom Moore, and Patricia Birch (A. 292-293). Respondents asserted that these witnesses were not called to testify "because their testimony was merely cumulative and repetitive." Therefore, respondents contended no adverse inference should be drawn from the failure of these witnesses to testify,<sup>13</sup> and that, if permitted to testify, all four

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<sup>12</sup>The Administrative Law Judge also relied on her observation of the witnesses, the consistence and reliability of their testimony, the presence of contradictory testimony and other factors in making her credibility findings (see e.g. A. 3, 6 n. 3, 14 n. 7, 16 n. 10, 25 n. 20, 29-32). Along with the credited testimony, the Administrative Law Judge also noted and relied on the many inconsistencies, shifting reasons, and implausibilities in the respondents' position (A. 28-35).

<sup>13</sup>No adverse inference was in fact drawn from the failure of Birch to testify and Moore was not mentioned in the Administrative Law Judge's decision (A. 293, n. 1).

"would state that they were informed of the decision to terminate Doucette before May 29, 1973, when Doucette participated in the union grievance meetings" (A. 292-293). In its original decision June 13, 1974, the Board denied respondents' motion to re-open the record on grounds that it raised "no material or substantial issues relevant to the proceedings herein" (A. 277, n. 1).

### III. THE SUPPLEMENTAL PROCEEDINGS PURSUANT TO THE COURT'S REMAND ORDER

On October 29, 1974, the Board filed an application for enforcement of its order in this Court.<sup>14</sup> On November 18, 1974, respondents applied to the Court for an order to adduce additional evidence — the testimony of Antonelli and Marino — before the Board (A. 293-295). The reasons were substantially the same as those offered to the Board but were accompanied by purported affidavits of Marino and Antonelli and the affidavit of respondents' trial counsel (A. 294-296). On December 3, 1974 the Court granted the motion and remanded the case to the Board (A. 289, 296). On March 18, 1975, the Board issued an order reopening the record and directing a further hearing before the Administrative Law Judge "limited to the matters raised by Marino's and Antonelli's testimony" (A. 289, 296). This hearing was held on May 2, 1975 (A. 297).

At the re-opened hearing, Stage Manager Marino testified as to the operation of the show, his own responsibilities, and the job tasks of Doucette Sr. and Doucette Jr. (A. 319-328, 342-343, 345-346, 348-349); the problems uncovered during the Toronto run of the show (A. 328-343,

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<sup>14</sup>To avoid difficulties in determining where the unfair labor practices "occurred" (Cincinnati, Los Angeles or both) and to facilitate travel for appellate counsel, the Board filed its application in this circuit where the respondents both transact business and maintain offices (A. 3-4). See Section 10(e) of the Act.

343-344, 348-350, 357-358); his opinion of the abilities of the Doucettes and his discussions with the Waissmans, Davis, and Smith on those views (A. 333-340, 352-355, 356); his involvement in the Weeden grievance meetings (A. 340-341, 350-352); and the events surrounding the Los Angeles discharges (A. 341, 353-354, 356). Antonelli testified as to his own duties as manager of the road company and the duties of Doucette Sr. (A. 359-361, 368-370, 380-382); the April run in Toronto and the steps taken to correct the defects found there (A. 361-363, 370-371); the Weeden grievance incident (A. 364-365, 373); his discussions with Davis with respect to Doucette Sr. (A. 363-364, 371-372, 375-376); and circumstances surrounding the Los Angeles discharges (A. 365-368, 373-376, 379-380, 383-389).

Based on this testimony, the Administrative Law Judge affirmed many of her prior findings of fact, added to or modified other findings, and withdrew certain others (A. 298-316).<sup>15</sup> In particular, she noted that Marino's testimony confirmed her discrediting the testimony of the Waissmans, Davis and Smith to the effect that Doucette Sr. was discharged for alleged defects in the April Toronto run (A. 297-303). Thus, Marino credibly testified that the "Edsel panel" was tried at Toronto, then dropped at his order because it was "dangerous," that this was explained to Production Supervisor Smith, and that the other shortcomings in the Toronto show were either outside Doucette's jurisdiction or largely the responsibility of Marino himself (A. 298-303; 326-327, 330-331, 343-344, 349-350). As Marino stated it, ". . . all the things that they complained about that they felt were Mr. Doucette's responsibility, I didn't agree with" (A. 302; 344). Marino's testimony also lent support to the prior Board findings concerning his statements to Doucette Sr. shortly after the discharges

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<sup>15</sup> The statement of facts, *supra*, reflects the Judge's revised findings of fact.

(A. 306-307; 341) and his expressions of having trouble getting along with Doucette (A. 303; 333-334, 328), as well as the Board's determination that Doucette Sr. was a rank-and-file employee (A. 313-315; 345-346, 340, 323-324).<sup>16</sup> The Administrative Law Judge also credited Marino's testimony that he came to regard Doucette Sr. as "lazy" and irresponsible, that he requested the Waissmans to replace him in mid-May, and that he understood from this discussion that Doucette eventually would be discharged (A. 304; 333-336, 352-353).<sup>17</sup> However, the Administrative Law Judge noted that the Waissmans "pacifying" statements to Marino fell short of genuine intent to fire Doucette, that Marino was never given any specific assurance of such a discharge, and that there was no evidence that Marino's recommendation was relied upon for the discharge decision (A. 305-306). Accordingly, she concluded that Marino's request for discharge based on his general dissatisfaction with Doucette Sr. was not a significant factor in Doucette's June 17 discharge (A. 306-307).<sup>18</sup>

Antonelli's testimony was found to corroborate the findings based on Doucette Sr.'s prior testimony concerning Antonelli's statements to Doucette

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<sup>16</sup>The Administrative Law Judge indicated that, if Marino's testimony concerning Doucette's reliance on the "house carpenter" for employee selection and problem-handling had been in the prior record, she would have found that Doucette Sr. did not possess authority to responsibly direct the stagehands, but rather "was acting as a highly skilled craftsman who made mechanical and quasi-artistic judgments with respect to equipment rather than employees" (A. 313-314).

<sup>17</sup>Marino made it clear, however, that his request for Doucette's discharge was not based on the "Edsel panel" matter and that he "was not referring back, necessarily to Toronto" (A. 304; 356).

<sup>18</sup>With respect to Marino's unfavorable comments about Doucette Jr., the Administrative Law Judge noted that they were made after April 23 (the date on which respondents asserted the discharge decision was made) and were not mentioned by the other witnesses of respondents as a motivating factor (A. 307-308).

Sr. at the time of discharge (A. 309; 368); and confirmed that Antonelli did not learn of Doucettes' discharges until the day they occurred (A. 308-309; 365-366). Antonelli also corroborated Marino's lack of "surprise" at seeing Doucette Sr. in the Weeden grievance meeting (A. 316; 365, 340), and several other findings (A. 311-312, 314, 315). While Antonelli testified that he, at some unspecified time, "just felt" or "just knew" that General Manager Davis would discharge Doucette Sr. (A. 363-364), he offered no substantive basis for such feelings (A. 308-310). Moreover, based upon Antonelli's demeanor along with his admitted statement to Doucette Sr. about not knowing the reason for the discharges (A. 368), his lack of prior awareness of the date of the discharges (A. 365), and his failure to line up replacements in anticipation of the discharges (A. 366-367, 374), the Administrative Law Judge discredited "much of Antonelli's testimony about Davis' alleged complaints to him" concerning Doucette (A. 309-310). The Administrative Law Judge also noted that, by Antonelli's version, it was Davis who determined the discharges, whereas at the first hearing Davis and the Waissmans testified that it was the Waissmans who made the discharge decision contrary to Davis' recommendation (A. 309-310).

The Administrative Law Judge thus concluded that the "evidence received on remand contains nothing which would warrant altering the Board's [initial] Conclusion of Law" and recommended adoption of the Board's prior order (A. 316-317). On December 10, 1975, the Board affirmed the Administrative Law Judge's supplemental findings and conclusions and adopted her recommended Order (A. 288-290).

## ARGUMENT

SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTS THE BOARD'S FINDING THAT RESPONDENTS VIOLATED SECTIONS 8(a)(3) AND (1) OF THE ACT BY DISCHARGING THE DOUCETTES BECAUSE THE ELDER DOUCETTE PARTICIPATED IN GRIEVANCE MEETINGS ON BEHALF OF A FELLOW EMPLOYEE AND BY STATING THAT THE DISCHARGES WERE FOR THAT UNLAWFUL REASON.

**A. The Board properly found that Doucette Sr. was an employee within the meaning of the Act.**

A threshold question here is whether the Board properly found Doucette Sr. was an employee within the meaning of Section 2(3) of the Act and therefore entitled to the protection of the Act, rather than a supervisor within the meaning of Section 2(11) of the Act.<sup>19</sup>

The question of whether a particular individual is a supervisor within the meaning of the Act is "essentially a question of fact" and the

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<sup>19</sup> As noted above, the Administrative Law Judge originally concluded that Doucette Sr. was a supervisor, but found that his discharge nevertheless violated Section 8(a)(1) and (3) of the Act because, under the circumstances in which it was effectuated, his discharge tended to instill in employees fear of retribution if they engaged in similar activity. The Board majority, reversing on the supervisor issue, found it necessary to consider the Administrative Law Judge's rationale in this regard. , the Administrative Law Judge in her supplemental decision indicated that, the evidence adduced in the reopened hearing been before her originally, she would not have found Doucette to be a supervisor (A. 313).

Moreover, even aside from the Administrative Law Judge's change of mind in the light of the new evidence, the Board's disagreement with her is of little, if any, significance because the Board was acting within its area of special competence of applying the general provisions of the Act to the established evidence. *N.L.R.B. v. Weingarten*, 420 U.S. 251, 266-267 (1975) and cases there cited. See *Oil, Chemical etc. Workers, Local 4-243 v. N.L.R.B.*, 362 F.2d 943, 945-946 (C.A.D.C., 1966); *N.L.R.B. v. Duquesne Electric & Mfg. Co.*, 518 F.2d 701, 704 (C.A. 3, 1975) (Administrative Law Judge's findings other than credibility resolutions, "when contested, become merely advisory").

Board's findings relative thereto are entitled to great weight." *N.L.R.B. v. Metropolitan Life Insurance Co.*, 405 F.2d 1169, 1172 (C.A. 2, 1968).<sup>20</sup> Accord: *N.L.R.B. v. International Metal Specialties, Inc.*, 433 F.2d 870, 872 (C.A. 2, 1970), cert. denied, 402 U.S. 907; *Amalgamated Local Union 355 v. N.L.R.B.*, 481 F.2d 996, 1000 (C.A. 2, 1973). This is because the "infinite variations and gradations of authority," from general manager to "straw boss," which can exist in any business enterprise may require expertise to evaluate the actual distribution of power. *Metropolitan Life, supra*, loc. cit.; *N.L.R.B. v. Swift & Co.*, 292 F.2d 561, 563 (C.A. 1, 1961) quoted with approval in *Marine Engineers v. Interlake Steamship Co.*, 370 U.S. 173, 179, n. 6 (1962) and in *Kaiser Engineers v. N.L.R.B.*, \_\_\_ F.2d \_\_\_, 92 LRRM 3153, 3155 (C.A. 9, 1976). And Congress, when amending the Act in 1947 to exclude supervisors, made clear that it intended to exclude only individuals possessing "genuine management prerogatives" and to permit inclusion under the Act's protection of "employees with minor supervisory duties" such as "straw bosses, leadmen, set-up men, and other minor supervisory employees." S. Rep. No. 105, 80th Cong. 1st Sess. p. 4, 1 Leg. Hist. 410 (1948). See, *N.L.R.B. v. Security Guard Service, Inc.*, 384 F.2d 143, 147 (C.A. 5, 1967); *Precision Fabricators, Inc. v. N.L.R.B.*, 204 F.2d 567, 569 (C.A. 2, 1953); *N.L.R.B. v. Southern Bleachery & Print Works, Inc.*, 257 F.2d 253, 239 (C.A. 4, 1958), cert. denied, 359 U.S. 911 (1959).

<sup>20</sup>Section 2(11) defines a "supervisor" as:

... any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances or effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well settled that, while the supervisory functions are listed in the disjunctive (e.g., *Metropolitan Life, supra*, 405 F.2d at 1173), the exercise of each function must be "in the interest of the employer" and involve "the use of independent judgment." *N.L.R.B. v. Security Guard Service, infra*, 384 F.2d at 147.

Similarly, the fact that a highly trained or skilled employee instructs others less skilled and sees whether the work is properly completed does not exclude him from the protection of the Act. *Kaiser Engineers, supra*, loc. cit.; *N.L.R.B. v. Doctors' Hospital of Modesto*, 489 F.2d 772, 776 (C.A. 9, 1973). See also *Security Guard Service, supra*, 384 F.2d at 149; *Westinghouse Broadcasting Co. v. N.L.R.B.*, 503 F.2d 1055 (C.A. 2, 1974) (*per curiam*) ("producer-directors" of TV station held not to be supervisors) and *Post-Newsweek Stations*, 203 NLRB 522, 523 (1973) cited therein.

Here, Doucette's only participation in any actual hiring was to get the job of his assistant for his son. This isolated incident, as the Board found (A. 278), was scarcely "an example of a supervisor's power of 'effective recommendation.'" Rather than serving "the interest of the employer," as Section 2(11) requires, it appears to have served mainly the family or work relationship concerns of Doucette himself.

Nor is there any substantial evidence that management regarded him as a statutory supervisor. General Manager Davis who hired him viewed his job as that of a "straw boss". No witness in this proceeding except Stage Manager Marino, who testified only at the reopened hearing, expressed the belief that Doucette was a supervisor (A. 328). Marino's opinion was negated by his own testimony that he viewed Doucette as the "shop steward" to protect fellow employees (A. 340; see also A. 147) and that the "house carpenter" at each theatre actually directed and assigned the work of the local carpenters and handled work "problems" with them while Doucette merely indicated where and how to place the scenery.

Indeed, before the Board, respondents initially conceded that Doucette was a statutory employee (A. 35, 379; Tr. 94).<sup>21</sup> Moreover, Stage Manager Marino's testimony reinforced the Board's finding (A. 279), based on the original record, that Doucette's job "was to adapt the set of the production to each theatre . . . [which] required him to explain to other employees how the stage should be set for this particular play, but did not require actual supervision or direction of the stagehands . . ."

The evidence of respondents' two witnesses at the reopened hearing also reinforced the Board's original finding (A. 279) that Doucette's participation in the hiring of local carpenters was "so minimal and so devoid of independent judgment as to negate" any conclusion that he possessed supervisory authority in this regard. Thus, shortly after the show began its road tour in Boston, Doucette worked out with Company Manager Antonelli how many stagehands would be required for the show when it moved. According to Antonelli and Marino (A. 360, 322-323), this number did not vary from city to city. Each time, however, Doucette had to get Antonelli's approval of the number (A. 360). Thereupon, Doucette's function was merely to fill out for the Union a "yellow card" requesting the specified number of men, get it signed by a local union representative, and mail one copy to the national Union and another to the local union in the next city which actually selected the men. *Supra*, p. 5. Plainly, as the Board found, this was no more than a "mechanical task" — of "a merely routine or clerical nature," as Section 2(11) puts it. Accordingly, there is ample warrant in the whole record for the Board's finding that Doucette Sr. was a rank-and-file employee within the meaning

<sup>21</sup>The issue of Doucette's possible supervisory status was raised by the Administrative Law Judge (A. 35-36; 111). However, on the basis of Marino's testimony, she withdrew her original finding that Doucette was a supervisor and concluded that he "was acting as a highly skilled craftsman who made mechanical and quasi-artistic judgments with respect to equipment rather than employees" (A. 313-314).

of the Act and thus entitled to the protection of Section 7 with regard to union and other protected concerted activities.

**B. Substantial evidence on the whole record supports the Board's finding that Doucette was discharged because of his activity in support of employee Weeden's grievance**

Determination of the motive of respondents in discharging Doucette and his son turns in large part upon resolutions of credibility. The Administrative Law Judge, affirmed by the Board, credited the testimony of Doucette Sr. that General Manager Davis told him that his discharge on June 17 was because of Doucette's participation on behalf of employee Weeden in the grievance meetings on Weeden's discharge, and discredited claims of Davis and Producers Weissman and Fox that the decision to discharge Doucette was made on April 19 or 23 based on Doucette's alleged deficiencies in "hanging" and maintaining the show's sets at Toronto. Doucette's version was corroborated by, *inter alia*, Davis's concern about Doucette's participation in Weeden's grievance evidenced by Davis's admitted telephone call to Doucette after the first grievance meeting he attended telling him not to involve himself further in Weeden's grievance and to "let them take care of it."

It is well settled resolutions of credibility by an Administrative Law Judge who sees and hears the witnesses should not be upset by a reviewing court "unless on its face [the testimony] is hopelessly incredible . . . or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony." *N.L.R.B. v. Dinion Coil Co.*, 201 F.2d 484, 490 (C.A. 2, 1952); *N.L.R.B. v. A & S Electronics Die Corp.*, 423 F.2d 218, 220 (C.A. 2, 1970), cert. denied, 400 U.S. 833.<sup>22</sup>

<sup>22</sup>This standard of review stems from the provision of Section 10(e) of the Act that "[t]he findings of the Board with respect to questions of fact if supported by

(continued)

A discharge violates Sections 8(a)(3) and (1) of the Act if it is motivated "in significant part" by the employee's union or other protected concerted activities related to the terms and conditions of employment of himself or other employees. *N.L.R.B. v. D'Armigene, Inc.*, 353 F.2d 406, 409 (C.A. 2, 1965); *N.L.R.B. v. Dorn's Transportation Co.*, 405 F.2d 706, 713 (C.A. 2, 1969). This includes the processing of grievances on behalf of other employees. *N.L.R.B. v. Interboro Contractors, Inc.*, 388 F.2d 495, 499-500 (C.A. 2, 1967); *Socony Mobil Oil Co. v. N.L.R.B.*, 357 F.2d 662, 663-664 (C.A. 2, 1966).

While motive is subjective, it is "a question of fact to be determined by the Board from consideration of all the evidence" *N.L.R.B. v. Murray Ohio Mfg. Co.*, 358 F.2d 948, 950 (C.A. 6, 1966), including "circumstantial evidence and 'inferences of probability drawn from the totality of other facts'" *N.L.R.B. v. Long Island Airport Limousine Service Corp.*, 468 F.2d 292, 295 (C.A. 2, 1972). "If the [Board's] inference may reasonably be drawn, [the reviewing court] may not substitute other inferences even though equally reasonable." *N.L.R.B. v. J.W. Mays, Inc.*, 356 F.2d 693, 698 (C.A. 2, 1966).

Further, "an outright confession of unlawful discrimination" by a responsible management official, if established, "eliminate[s] any question concerning the intrinsic merits . . . of the individual discharges, . . . or other causes suggested as a basis for the discharge." *N.L.R.B. v. Ferguson*, 257 F.2d 88, 92 (C.A. 5, 1958), quoted and applied, *N.L.R.B. v. Globe Products Corp.*, 322 F.2d 694, 696 (C.A. 4, 1963); *N.L.R.B. v. John Langenbacher Co.*, 398 F.2d 459, 463 (C.A. 2, 1968), cert. denied, 393 U.S. 1049. "[I]f words attributed to those authorized to speak for management [Davis here] are credited as having been said, their form and

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<sup>22</sup> (continued)

substantial evidence on the record considered as a whole shall be conclusive." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 485-486, 495-497 (1951).

content eliminate all doubt on motive." *Ferguson, supra*, 257 F.2d at 90.

Here, Doucette credibly testified (A. 28-29) that General Manager Davis told him he was discharged because Davis was "mad at [him] for bringing the [Union] representative into Cincinnati, that was causing [Davis] troubles . . . [Doucette] should have minded [his] own business and should never have got into that part of it."<sup>23</sup> That the grievance was a major concern to Davis is shown not only by his admitted telephone call to Doucette telling him to stop his grievance activity after the first meeting but also by Davis's account of his meeting with the Union representative in New York in the midst of the grievance proceeding at which the "union raised as [sic] our firing of Mr. Weeden, the possibility of our trying to get away with[out paying] vacation pay" (A. 178).<sup>24</sup>

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<sup>23</sup> A statement of an unlawful reason for discrimination in employment constitutes an independent violation of Section 8(a)(1) of the Act if it is made in the presence of other employees. *Warton Drilling Co.*, 171 NLRB 1197 (1968); cf. *Colecraft Mfg. Co. v. N.L.R.B.*, 385 F.2d 998, 1004 (C.A. 2, 1967). It follows that the same is true if the employer should reasonably expect that such a statement would likely be relayed to other employees. Here, Doucette certainly should have been expected to have relayed Davis's statement of such unlawful reason to his son since the son's discharge was in effect based upon the same unlawful reason, *infra*, p. 30.

<sup>24</sup> Davis also testified that, in the same meeting, the New York Union representative was angry at Doucette over the manner in which Doucette made up the "yellow card" for Union referral of stagehands (A. 178). However, Davis scarcely could claim that the Union's displeasure with Doucette on May 31 was the reason for his discharge which Davis claimed had been decided upon April 18 or 23. Further, the evidence indicates that Doucette made out the yellow card in a manner that saved the respondents the wages of an additional local stagehand by listing himself merely as an "advance" man who, under Union rules, would not have to be replaced by a local man when Doucette was out of town surveying the next theater (A. 148-149). Moreover, the stagehand manning of the show was worked out initially with Company Manager Antonelli and he had to approve the "yellow card" for each move. *Supra*, pp. 24, 4-5.

The Board's finding that this participation of Doucette in Weeden's grievance was the real reason for the discharge of the Doucettes is also reinforced by the respondent's implausible claim that Doucette was discharged because of faults in his work two months earlier. *McGraw-Edison Co. v. N.L.R.B.*, 419 F.2d 67, 75 (C.A. 8, 1969) ("an implausible explanation by the employer for its action" is evidence of an unlawful motive); *N.L.R.B. v. Griggs Equipment Co.*, 307 F.2d 275, 278 (C.A. 5, 1962) (employer's explanations "failed to withstand scrutiny"). In its original decision, the Board based its discrediting the Waissmans and Davis in part upon the failure of respondents to call as witnesses two management representatives directly concerned with Doucette's work performance — the road show's Manager Antonelli and Stage Manager Marino — although both were still employed by respondents. Respondents claimed that they were not called because their testimony would be "cumulative and repetitive." However, when these two were called by respondents on this Court's remand of the case to the Board, their testimony served to reinforce the discrediting of respondents' asserted reasons for Doucette's discharge, as the Administrative Law Judge found. Thus, Marino testified that he made plain to Production Supervisor Smith and Producer Fox that the faults in the Toronto show attributable to Doucette or within his power to rectify were minor, particularly compared to the deficiencies of others, although Doucette purportedly was the only one chosen for discharge. And, as the Administrative Law Judge found (A. 301), the "testimonial efforts by Smith and Miss Fox to exaggerate (to say the least of it) Doucette's culpability . . . and to minimize Marino's role" support the finding that "these defects were not the real reason for Doucette's discharge."

Further, although Davis knew that it was "not easy finding a good road carpenter" (A. 174) and Doucette's discharge purportedly had been definitely decided upon in April, Davis was vague about any effort

to obtain a replacement for him, testifying only that he had "a feeling that I made my telephone call while the show was in Denver [June 5-10], to find out availability" (A. 195). Significantly, as the Board found (A. 24-25, this was only a few days after Doucette's grievance activity May 29-June 1.<sup>25</sup>

That Doucette's grievance activity was the real reason for his discharge is further supported by respondents' failure to give any advance notice of the discharge to the two management representatives most directly concerned with operation of the road show — Company Manager Antonelli and Stage Manager Marino — and the failure to disclose to Antonelli respondent's claimed reason for the discharge <sup>WHICH</sup> ~~with~~ Antonelli was directed to effectuate (A. 310-311; 368, 25). Nor had respondents ever warned or reprimanded Doucette regarding his alleged shortcomings. *Supra*, p. 10. Finally, this abrupt discharge of Doucette for his alleged faulty work two months earlier came only five days after the Los Angeles opening at which the Weissmans had praised the show, which Doucette had hung, as looking "beautiful" or "wonderful". *Supra*, p. 13. And, as this Court has held, "[t]he abruptness of a discharge and its timing are persuasive evidence as to motivation." *N.L.R.B. v. Montgomery Ward & Co.*, 242 F.2d 497, 502 (C.A. 2, 1957), cert. denied, 355 U.S. 829. See also *N.L.R.B. v. Lou De Young's Market Basket, Inc.*, 406 F.2d 17, 22 (C.A. 6, 1969), cert. granted and remanded on other grounds, 395 U.S. 828 (failure to warn of alleged delinquencies); *N.L.R.B. v. Tru-Line Metal Products Co.*, 324 F.2d 614, 616 (C.A. 6, 1963), cert. denied, 377 U.S. 906 (failure to warn or reprimand, abruptness and timing of discharges, implausible reasons for discharge).

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<sup>25</sup> In addition, Davis's claim that he then was able to replace Doucette with a road carpenter who reported to the Los Angeles show in "two or three weeks" (A. 194) was negated by Company Manager Antonelli's testimony that a road carpenter did not report to the show until September (A. 315; 367, *supra*, pp. 14-15).

Accordingly, the totality of the facts buttress Davis's confession of an unlawful reason for the discharges and the Board's finding that respondents violated Section 8(a)(1) and (3) of the Act is amply supported by substantial evidence on the whole record.

**C. The discharge of Doucette Jr. violated Section 8(a)(3) and (1) of the Act because it was based upon his father's unlawful discharge for protected concerted activities.**

Company Manager Antonelli conceded that he told Doucette Sr. that Doucette Jr. was discharged because "he is your son" (A. 310-311: 368, 25). Doucette credibly testified that the next day General Manager Davis told him the same thing despite Doucette's protest that his son "had nothing to do with it" and "never attended none of the meetings" (A. 28).

Like Davis's statement of an unlawful reason for the father's discharge, this too was "an outright confession of unlawful discrimination" since it is well established that the discharge of an employee because of a relative's protected activities violates the Act. See, e.g., *N.L.R.B. v. Dewey Bros., Inc.*, 80 LRRM 2112 (C.A. 4, 1973) (*per curiam*) (discharge of a supervisor because of his wife's union activities held unlawful); *Champion Papers, Inc. v. N.L.R.B.*, 393 F.2d 388, 395 (C.A. 6, 1968) (*per curiam*) (refusal to hire wife because of husband's union activity); *J.P. Stevens & Co., Inc., Gulistan Div. v. N.L.R.B.*, 441 F.2d 514, 519 (C.A. 4, 1971), cert. den., 404 U.S. 830 (refusal to hire relative of union activist); *Salant Corp.*, 214 NLRB No. 21 (1974), 88 LRRM 1314 (discharge of wife because of husband's union activity).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Board's order should be enforced in full.<sup>26</sup>

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<sup>26</sup> The Board properly held Theatre Now liable as a joint employer with The Grease Company for the unfair labor practices here. Theatre Now admitted in the answer to the complaint and at the hearing that it was the agent of Grease Company, acting as Respondent Grease's "corporate general manager" (A. 47; 61). Davis, who discharged the Doucettes and made the statement of the unlawful reasons, was vice-president and a stockholder or partner of Theatre Now (A. 158). He also handled the Weeden grievance (A. 180).

There is no distinction under the Act between a "person" and an "employer" and it is settled that a person need not be the actual "employer" of employees discriminated against in order to be jointly liable for backpay. *N.L.R.B. v. Shuck Construction Co.*, 243 F.2d 519, 522-523 (C.A. 9, 1957); *Marriello Fabrics, Inc.*, 149 NLRB 333 (1964); *Cache Valley Dairy Assn.*, 103 NLRB 280 (1953). Accordingly, the Board's conclusion that Theatre Now and Grease Company occupied joint employer status with respect to liability was fully justified. *West Texas Utilities Co.*, 108 NLRB 407, 413-414, enf. 218 F.2d 824 (C.A. 5, 1955), cert. denied, 349 U.S. 953; *N.L.R.B. v. Wallick & Schwalm*, 198 F.2d 477, 479, 485 (C.A. 3, 1952).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 THE GREASE COMPANY and THEATRE )  
 NOW, INC., )  
 )  
 Respondents. )

No. 76-4087  
74-2396

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's  
offset printed brief in the above-captioned case have this day been served  
by first class mail upon the following counsel at the addresses listed below:

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NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 4th day of August, 1976.